

FTC/DOJ Hearings on Intellectual Property and Antitrust

Patent Settlements

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Overview

- Why do parties settle patent litigation?
- What policies come into play?
- What antitrust issues do patent settlements raise?

Why Parties Settle

Eliminate Uncertainty and Risk

- Settlements facilitate business planning
- Eliminating risk reduces capital costs

Avoid Litigation Costs and Fall-Out

- Expenses of trial
- Management distraction
- Adverse publicity
- Depressed shareholder value

Litigation Expectations Change

- Parties re-assess possible outcomes based on:
 - Discovery,
 - Court rulings (*Markman* decision, summary judgment),
 - Court settlement pressure.

A Sensible Business Deal Emerges

- Earlier impediments to a deal fall away:
 - Market environment changes
 - Strategic value of patent in suit changes
 - Litigation prospects change
- Parties develop more assets worth trading (including new patent rights).

What Policies Come Into Play?

Preserving Competition

- Antitrust policy recognizes two values with different time horizons
 - Static welfare considerations from price competition
 - Dynamic welfare considerations from innovation
 - Antitrust and patent goals align more closely

Promoting Innovation

- Harsh or uncertain antitrust rules may deter settlements.
 - This could undermine the value of patents and corresponding incentives to innovate.

Promoting Efficiency

- Eliminate risk and uncertainty
- Avoid legal expenses
- Facilitate efficient transactions
 - Better information available in settlement context than in pre-litigation licensing context.
 - Antitrust rules that discourage settlements could lead to less efficient licensing transactions.

Weeding Out Invalid Patents

- Patent system relies on courts to determine patent validity. Settlements avoid that determination.
 - Disserves patent policy and antitrust policy.
- BUT antitrust rules that discourage settlements could deter patent challengers from risking litigation in the first place.

Judicial Policies Favoring Settlement

- Two main elements of judicial policy favoring settlements:
 - General social policy favoring compromise of disputes
 - Conserving judicial resources

Antitrust Issues Raised By Settlements

How Do You Factor In The Patent's Power To Exclude?

- Presume the patent is valid?
- Attach no weight to the patent?
- Treat it as a fact issue?

Presume The Patent Is Valid

- Relationship is vertical, not horizontal;
- No anti-competitive effect can be attributed to the settlement agreement (only to the patent);
- 1995 IP Guidelines and case law analysis applies to licensing provisions in the settlement agreement.

Ignore The Patent Rights

- Parties' relationship is horizontal.
- Many common licensing restrictions could be per se illegal.
 - Territorial restrictions
 - Field-of-use restrictions
 - Time restrictions

Treating Patent Exclusionary Power As A Fact Issue

- Re-litigate validity issue in the antitrust case?
 - Inconsistent with policy of judicial economy?
- Introduce probability factors?
 - Is a probability analysis workable?
 - Would proof require privilege waivers? Is this fair?
 - Wouldn't this approach jeopardize all licenses?

What Is The Relevance of Intent?

- What kind of intent are we talking about?
 - Intent to exclude competition?
 - Isn't this the very essence of the patent right?
 - Intent to avoid determination of validity?
 - Isn't the very purpose of every settlement to avoid adverse decision?
 - Can multiple settlements suggest such an intent?

Is The Per Se Rule Appropriate?

- What about efficiencies from settlements?
- Are settlement agreements anti-competitive in an overwhelming number of cases?
- What about over-deterrence concerns?
- Isn't the judicial policy favoring settlement of litigation a "redeeming virtue"?

How Do Judicial Policies Favoring Settlement Factor In?

- These policies operate outside of the antitrust value scale
 - Can they be incorporated into rule-or-reason calculus?
 - Are these policies a makeweight, a trump card, or something else?

How Do Reverse Payments Affect The Analysis?

- Should they be presumptively unlawful?
- Does it matter whether the amount exceeds the recipient's expected return from entry?

Do Settlements Enjoy Noerr Immunity?

- Does the answer depend on the scope of court review and/or approval?

Summary of Issues

- How to weigh exclusionary power of patent
- Relevance of intent
- Appropriateness of per se treatment
- How to weigh judicial policies favoring settlement
- Effect of reverse payments
- Possible Noerr immunity